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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1934.

NO. 452

GEORGE A. ADAMOS, Petitioner (Appellant Below),

v.

NEW YORK LIFE INSURANCE COMPANY,
Respondent (Appellee Below).

## BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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NEW YORK LIFE INSURANCE COMPANY,
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## BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

## OPINIONS BELOW.

The opinion of the District Court reported in 5 F. Supp. 1010, which is the only opinion given in the petitioner's brief, is the opinion upon the petitioner's application for a rehearing of the case on its merits. The original opinion of the District Court is reported in 5 F. Supp. 278. The opinion of the Circuit Court of Appeals is reported in 71 F. (2d) 997.

## STATEMENT OF THE CASE.

A full hearing of this case on its merits has been had (R. 35-242). All the evidence which either party had to offer was received. No objection to the hearing was made by the petitioner at the opening of the trial (R. 35-36), nor at the close of the respondent's evidence (R. 147-148), nor at the conclusion of all the evidence (R. 205). The learned judge who heard the evidence was of the opinion that "This is a very plain case of fraud upon the insurance company" (R. 233). In the opinion upon the petition for rehearing, the District Court further says (R. 242):

> "To our mind, the proofs in this case disclosed a deliberate concealment by plaintiff of his physical condition and medical history, in order to induce the issuance of the insurance policies."

Undisputed testimony from nine disinterested physicians proved that the deceased was suffering from a far advanced cancer of his abdominal organs for several months before applying for the insurance in litigation (R. 59-107). Less than two months before applying for the insurance, the deceased was in one hospital for said disease (R. 84-85) and between delivery of the second and third policies he was treated in another hospital for his cancer (R. 61). Within three months after the issuance of the policies death occurred, the cause being the aforesaid cancer (R. 226).

When applying for the insurance, Adamos denied and concealed that he had had any illness, that he had consulted or been examined or treated by any physician or that he had been under observation or treatment in any hospital (R. 48-49).

The third and fourth policies were not delivered until the latter part of May or the first part of June, 1932 (R. 117-118, 125). The medical examination on which the policies are based was made on April 6, 1932 (R. 48). Between April 6th and the latter part of May, Adamos was confined in a hospital (R. 61) and after leaving there continued to return for some time for treatments (R. 106) and was attended by four different physicians (R. 60, 100, 102-103, 106). No disclosure whatever of this intervening medical history was made to the company when these policies were delivered to Adamos (R. 127).

Each policy contains a provision that the insurance "shall not take effect unless and until the policy is delivered to and received by the applicant and the first premium thereon paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician since his medical examination" (R. 219). Between the medical examination for and the delivery of the last two policies, Adamos consulted or was treated by at least four doctors (R. 60, 100, 102-103, 106). There is also some evidence to the effect that Adamos had medical treatment between the medical examination for and the delivery of the two policies first issued (R. 48, 122, 226).

## ARGUMENT.

### Summary.

I.

THE CASE WOULD NEVER REACH THE JURY.

II.

THE PROCEDURE BELOW WAS CORRECT.

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### I.

### THE CASE WOULD NEVER REACH THE JURY.

The proof of the fraud by which the insurance in litigation was procured is so clear and overwhelming that even if the case were tried at law before a jury, the trial judge would be duty-bound to direct a verdict for the defendant and thus take the case away from the jury. Where the evidence preponderates so heavily in favor of one side that the trial judge would feel bound to set aside a verdict for the other side as being against the manifest weight of the evidence, it is not only his right but his duty to direct a verdict for the party in whose favor the evidence so preponderates: *Pennsylvania R. R. Co. v. Chamberlain,* 288 U. S. 333. Cases in which that principle has been applied to a state of evidence analogous to but not stronger than that in the case at bar are legion in number and include the following: *New York Life Insurance Co. v. Price,* 16 F. (2d) 660; *New York Life Insurance Co. v. McCarthy,* 22 F. (2d) 241; *Tutewiler v. Guardian Life Insurance Co.,* 42 F. (2d) 208; *Fountain & Herrington v. Mutual Life Insurance Co.,* 55 F. (2d) 120; *Self v. New York Life Insurance Co.,* 56 F. (2d) 364; *Aetna Life Insurance Co. v.*

*Bolding*, 57 F. (2d) 626; *DeRoy v. New York Life Insurance Co.*, 61 F. (2d) 317; *Aetna Life Insurance Co. v. Perron*, 69 F. (2d) 401; *New York Life Insurance Co. v. Stewart*, 69 F. (2d) 957; *Dudgeon v. Mutual Benefit Ass'n*, 70 F. (2d) 49; *Jefferson Standard Life Insurance Co. v. Stevenson*, 70 F. (2d) 72; *Lyttle v. Pacific Mutual Life Insurance Co.*, 72 F. (2d) 140. In each of those cases it was held that the case should be taken from the jury and a verdict directed for the insurance company.

The two policies last issued, and perhaps the first two also, are also vitiated because of the nondisclosure of pertinent information when they were delivered. In *Stipcich v. Metropolitan Life Insurance Co.*, 277 U. S. 311, this Court held that an applicant for insurance must inform the insurer when delivery of a policy is tendered to him of any pertinent facts bearing on his health which have occurred between the date of his medical examination and delivery of the policy. Adamos, on account of his cancer, had been confined and treated in a hospital and had been attended by at least four doctors between the medical examination for and delivery of the last two policies (R. 60-61, 100, 102-103, 106). None of these facts was disclosed by Adamos when the policies were delivered to him (R. 127).

The last two policies, and perhaps the first two also, are void for the additional reason that the condition precedent to their going into effect was broken. The express provision in the policies that they should not take effect if the applicant consulted or was treated by any physician between the date of his medical examination and the delivery of the policy was unquestionably violated. Such a provision constitutes a condition precedent which is valid and will be enforced: *Bostick v.*

*New York Life Insurance Co.*, 284 Fed. 256; *MacKelvie v. Mutual Benefit Life Insurance Co.*, 287 Fed. 660; *New York Life Insurance Co. v. Horton*, 9 F. (2d) 320; *Aetna Life Insurance Co. v. Johnson*, 13 F. (2d) 824; *Mutual Life Insurance Co. v. Tabb*, 49 F. (2d) 1019; *Subar v. New York Life Insurance Co.*, 60 F. (2d) 239; *Gill v. Mutual Life Insurance Co.*, 63 F. (2d) 967.

Since, therefore, the petitioner's case would not reach the jury even if tried before one, the petitioner has not been deprived of a trial by jury and has suffered no prejudicial harm.

This case differs from that of *Enelow v. New York Life Insurance Co.*, No. 1065 October Term, 1933, in this Court, in that this case has been fully heard on its merits, and from the proofs it is clear that, even if the case were tried before a jury, the trial judge would be compelled to direct the verdict and thus decide the case himself.

## II.

## THE PROCEDURE BELOW WAS CORRECT.

The decisions below with respect to the procedure followed in this case are supported by the following precedents: *Liberty Oil Co. v. Condon National Bank*, 260 U. S. 235, 241, 242-243; *Phillips-Morefield v. Southern States Life Insurance Co.*, 66 F. (2d) 29, 30 (C. C. A. 5); *New York Life Insurance Co. v. Marotta*, 57 F. (2d) 1038 (C. C. A. 3); *New York Life Insurance Co. v. Hurt*, 35 F. (2d) 92 (C. C. A. 8), 41 F. (2d) 392; 51 F. (2d) 936 (C. C. A. 10), certiorari denied, 285 U. S. 541; *Peake v. Lincoln National Life Insurance Co.*, 15 F. (2d) 303, 305 (C. C. A. 8); *Union Pacific R. Co. v. Syas*, 246 Fed. 561, 566 (C. C. A. 8).

The petition for certiorari indicates that the Fifth Circuit is in conflict with the Third Circuit. A decision by the Circuit Court of Appeals for the Fifth Circuit on all fours with the case at bar is in accord with the decisions below: *Phillips-Morefield v. Southern States Life Insurance Co.*, 66 F. (2d) 29, 30. That case contains a clear exposition of the reasons why the petitioner has not been deprived unlawfully of a jury trial.

*Phoenix Mutual Life Insurance Co. v. Bailey*, 13 Wall. 616; *Cable v. United States Life Insurance Co.*, 191 U. S. 288; *Buzard v. Houston*, 119 U. S. 347; and *Hipp v. Babin*, 19 How. 271, cited by the petitioner, were all decided before Section 274(b) was added to the Judicial Code. There was no provision in the law when those cases were decided for the introduction of equitable defenses in actions at law. None of those cases has anything to do with the manner in which an equitable issue introduced into an action at law under Section 274(b) of the Judicial Code should be disposed of. Those were all cases involving separate suits in equity. *Schoenthal v. Irving Trust Co.*, 287 U. S. 92, also involved a separate suit in equity. While no separate suit in equity may be maintained where there is a plain, adequate and complete remedy at law, that is beside the question here presented, which is how an equitable defense specifically authorized by a new provision added to the Judicial Code should be adjudicated. The answer to the question presented is contained in the cases first cited under this point in this brief.

The defense that the contract sued upon was induced by fraud is an equitable defense. The group of cases first cited under this point in this brief is authority also for that conclusion. To those might be added *Fay v. Hill*, 249 Fed. 415, 418 (C. C. A. 8). Fraud is

one of the best recognized branches of equity jurisdiction: *Bispham's Principles of Equity* (10 Ed.) §§ 197, 200; *1 Story's Equity Jurisprudence* (14 Ed.) § 260; *Jones v. Bolles,* 9 Wall. 364, 369.

There is no adequate remedy at law. One reason for this is that a different test is applied in equity for determining whether such fraud exists as will vitiate a contract. At law, in addition to the falsity and materiality of the representations, the complaining party must prove that the other party had knowledge of the falsity of his statements when he made them; in equity, the last element is immaterial and only the falsity and materiality of the representations need be shown in order to obtain relief: *2 Pomeroy's Equity Jurisprudence* (4 Ed.) § 885; *Smith v. Richards,* 13 Pet. 26, 36; *Turner v. Ward,* 154 U. S. 618; *In re American Knit Goods Mfg. Co.,* 173 Fed. 480, 482 (C. C. A. 2); *Taylor v. Burr Printing Co.,* 26 F. (2d) 331, 334 (C. C. A. 2); *New York Life Insurance Co. v. Marotta,* 57 F. (2d) 1038 (C. C. A. 3); *Halsey v. Minnesota-South Carolina L. & T. Co.,* 28 F. (2d) 720, 723 (C. C. A. 4); *Joslyn v. Cadillac Automobile Co.,* 177 Fed. 863, 867 (C. C. A. 6); *Herschberger v. Woodrow-Parker Co.,* 275 Fed. 908, 916 (C. C. A. 6); *Independent Harvester Co. v. Tinsman,* 253 Fed. 935, 937 (C. C. A. 7); *Fay v. Hill,* 249 Fed. 415, 419 (C. C. A. 8). Sooner or later, therefore, the respondent would have the right to have its defense of fraud adjudicated according to the equitable rule for determining whether a contract has been procured by fraud. Efficiency, economy and enlightened practice, as well as all other sound considerations, render it preferable to hold the hearing in equity in advance of the trial at law. That such is the proper order was declared by this Court in *Liberty Oil Co. v. Condon National Bank et al., supra,*

260 U. S. 235, 242. The inadequacy of the remedy at law need not be specifically averred in the defendant's pleadings, inasmuch as it follows from the application of the relevant legal principles to the facts of the case and is therefore a conclusion which the courts perceive.

The remedy at law must be in all respects equal to that in equity in order to oust the latter of jurisdiction: *Boyce v. Grundy*, 3 Pet. 210, 215. Here, for the reasons shown above, it is not so.

That the constitutional guaranty of trial by jury does not apply to equity procedure is well established: *Parsons v. Bedford et al.*, 3 Pet. 433, 446; *Barton v. Barbour*, 104 U. S. 126, 133. The defense of fraud in the procurement of a contract being an equitable one, since equitable defenses should be tried according to equitable principles and practice, and since there is no constitutional right to trial by jury in equity, an equitable issue, whether raised in an ordinary suit in equity or introduced into an action at law under Section 274(b) of the Judicial Code, should, and may constitutionally, be tried by a chancellor alone without a jury.

Furthermore, a full hearing of this case on its merits has been had, without any objection whatever thereto having been raised by the petitioner at any time during the hearing. By so doing it is submitted that the question of jurisdiction and procedure has become immaterial.

Respectfully submitted,

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